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No. 86-1944

In the Supreme Court of the United States

OCTOBER TERM, 1987

SOUNG O. KWOUN, ET AL., PETITIONERS

v.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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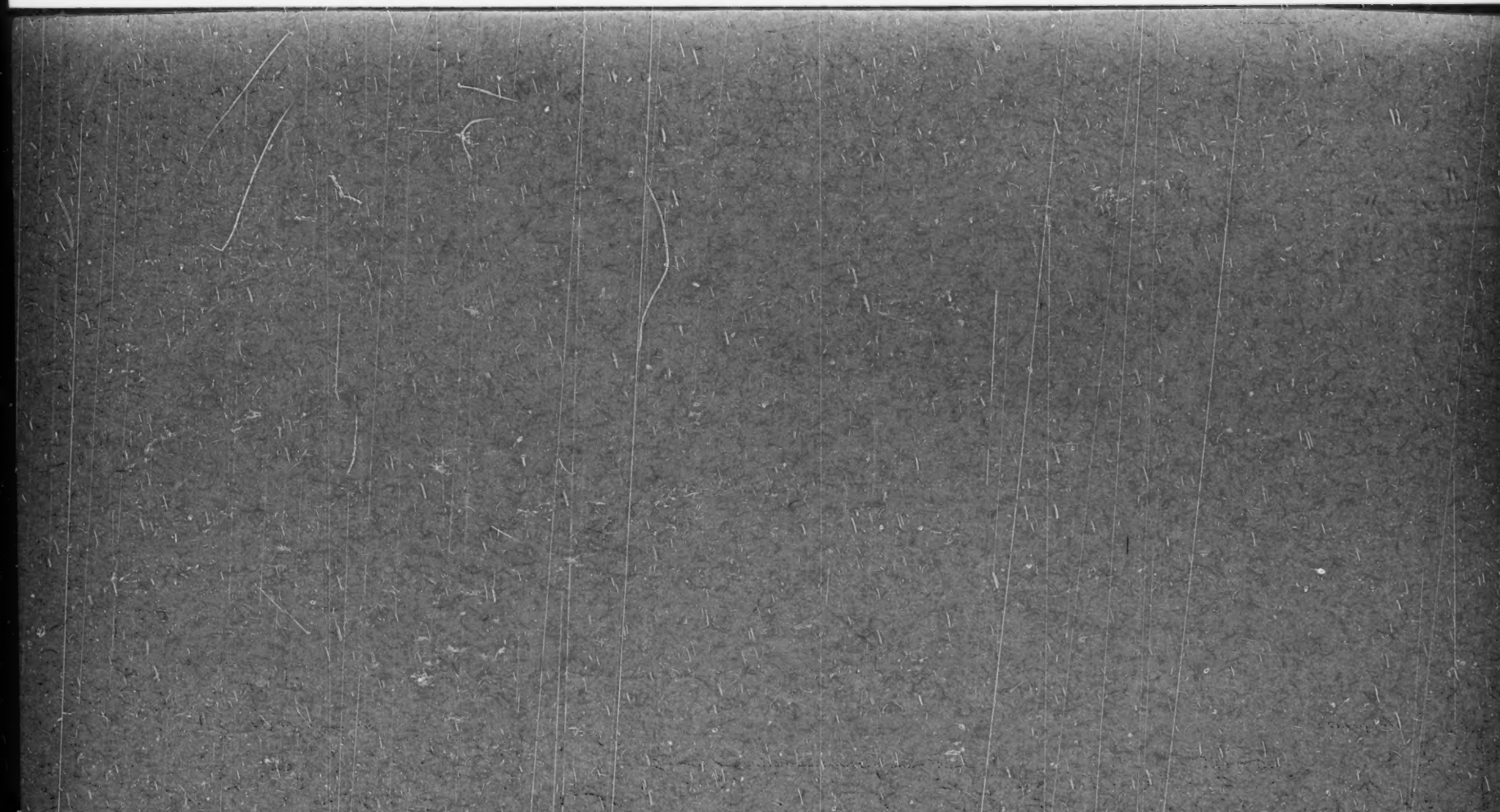

QUESTION PRESENTED

Whether the HHS employees who initiate and pursue an administrative action to exclude a physician from Medicare reimbursement based on the recommendation of a peer review committee are entitled to absolute immunity from damage suits when it is alleged that they committed procedural and substantive errors in violation of the physician's constitutional rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 811 F.2d 401. The opinions of the district court (Pet. App. 76a-123a, 124a-139a) are reported at 622 F. Supp. 520 and 632 F. Supp. 1091. The decision of the district court denying plaintiffs' motion to alter or amend the judgment (Pet. App. 140a-143a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 145a-146a) was entered February 4, 1987. A petition for rehearing was denied on March 9, 1987 (Pet. App. 147a-148a). The petition for a writ of certiorari was filed on June 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under the Medicare Act, the Secretary of Health and Human Services (HHS) is authorized to exclude a physician from participation in the Medicare program (meaning that no Medicare reimbursement may be made with respect to services furnished by the physician) upon recommendation by a committee of peer review physicians. The physician may then obtain de novo review before an administrative law judge. In this case, the administrative law judge reversed the initial administrative decision to exclude a physician. The physician then brought this suit, seeking damages from the peer review physicians who recommended exclusion and testified before the administrative law judge, as well as against the HHS employees who processed the recommendation, made the decision to exclude him, and defended that decision before the administrative law judge. The district court dismissed the complaint, and the court of appeals affirmed, holding that the defendants were entitled to absolute immunity.

1. The Medicare Act provides that HHS may not reimburse a physician who has furnished services which the Secretary determines were "substantially in excess of the needs of individuals" or "of a quality which fails to meet professionally recognized standards of health care." 42 U.S. 1395y(d)(1)(C). The Secretary may exclude from eligibility for future Medicare reimbursement a physician who has failed "in a substantial number of cases[,] substantially to comply" with his obligation to provide medically necessary care meeting professionally recognized standards, or who has "grossly and flagrantly" violated this obligation in one or more instances. 42 U.S.C. 1320c-5(b)(1).

In 1972, Congress established peer review committees of private physicians, called professional standards review organizations (PSROs), to help the Secretary review physicians' performance under Medicare and Medicaid. 42

U.S.C. (Supp. IV 1974) 1320c *et seq.*[1] Each PSRO was charged with the responsibility of determining whether services provided under Medicare or Medicaid were "medically necessary" and met "professionally recognized standards of health care." 42 U.S.C. (Supp. IV 1974) 1320c-4(a)(1). The PSROs were to make recommendations to the Secretary as to whether particular physicians should be excluded from Medicare eligibility. 42 U.S.C. (Supp. IV 1974) 1320c-6.

Under the procedures followed in this case, HHS could not exclude a physician without first giving notice of intent to exclude, in response to which the physician could submit documentary evidence and written argument, and request an informal hearing. 42 C.F.R. 420.102(a) (1980).[2] If HHS decides to exclude, the physician may appeal to an administrative law judge, where he has a right to a formal hearing with cross-examination and a requirement for a decision by the judge based upon the evidence of record. 42 U.S.C. 1395y(d)(3); 42 C.F.R. 405.1502(e), 405.1530, 405.1533 *et seq.*, 405.1547, 405.1557. If the decision of the administrative law judge is adverse, the physician may appeal to the Secretary's Appeal Council. 42 C.F.R. 405.1561 *et seq.* If this appeal fails, the physician may obtain judicial review in a federal district court. 42 U.S.C. 405(g), 1395y(d)(3).

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[1] We cite the statute as in effect when the facts of this case occurred (in 1979-1981). In 1982, the provisions of the Act regarding peer review were extensively amended. Pub. L. No. 97-248, § 143, 96 Stat. 382. As relevant here, these amendments are discussed at page 14, *infra*. Under the 1982 amendments, the peer review committees are now called "peer review organizations" or "PROs."

[2] We cite the regulations in effect when the facts of this case occurred; the present regulations governing exclusion of physicians based on peer review findings of substandard practice appear at 42 C.F.R. Pt. 1004. New Medicare exclusion procedures are discussed at pages 14-15 & n.12, *infra*.

2. This case started when the Health Care Financing Administration (HCFA), the HHS office which administers this program, told the Southeast Missouri PSRO that its area led the nation in hospital discharge rates per 1000 Medicare enrollees. III App. 365.[3] The resulting investigation focused on the Poplar Bluff Hospital, which had the highest patient readmission rate of the 21 hospitals in the Southeast Missouri area. *Ibid.*; I App. 117. The PSRO performed a detailed study of patient records at Poplar Bluff, selecting the records of patients with six or more admissions plus a random selection of surgical cases. I App. 117. Six physicians reviewed the records of 20 patients, totalling 135 records. *Ibid.* These patients averaged eight admissions for the six-month period covered by the study. *Ibid.*

Following this study, the PSRO sent Poplar Bluff Hospital a "Notice of Potential Violation," summarizing its findings and stating that the Hospital and staff physicians could be excluded from Medicare participation. I App. 118. A meeting was then held with the Poplar Bluff staff (which included Dr. Kwoun); at this meeting a list of violations was handed out, and under each violation a list of medical records identified by number, date of admission and doctor's initials. I App. 136-140; III App. 366. The most frequently appearing initials were "SOK," identifying Dr. Kwoun. I App. 143-148. The hospital administrator and staff were invited to compare the material presented with their records and discuss the matter. III App. 367.

This meeting took place October 29, 1979. III App. 366. At the meeting, it was also announced that the hospital would be placed on "non-delegated status," meaning that no surgery could be done on federally-funded patients

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[3] "App." refers to the appendix in the court of appeals. The hospital discharge rate is a way of measuring how frequently Medicare enrollees are being hospitalized.

unless an outside physician designated by the PSRO approved it. *Ibid.* During the succeeding weeks, considerable friction developed between Dr. Kwoun and the PSRO physicians responsible for approving surgery; Dr. Kwoun felt that the PSRO physicians were denying approval for surgery that should be done, while the PSRO felt that Dr. Kwoun was proposing unnecessary surgery and failing to comply with the procedures for PSRO review. III App. 368-371. On January 22, 1980, nearly three months after the initial meeting with the Hospital staff, the PSRO voted to recommend sanctions against Dr. Kwoun. I App. 166. The vote was 16 to 1, with one abstention. I App. 125.

The PSRO report recommending sanctions was sent to the Kansas City Regional Office of HCFA. III App. 375. The Regional Office concurred in the recommendation and sent it to the Bureau of Quality Control at HCFA Headquarters in Baltimore. III App. 376-377. The HCFA Bureau of Quality Control then sent Dr. Kwoun a notice formally proposing to exclude him from Medicare eligibility. I App. 171. Dr. Kwoun, through counsel, responded to the proposed exclusion, charging that the evidence did not support the PSRO findings and that Dr. Kwoun was the subject of discrimination, and requesting a hearing. I App. 178-181.

An informal hearing was then held before the Director of HCFA's Bureau of Quality Control. At this hearing, and in a subsequent written submission, Dr. Kwoun's counsel presented a detailed, case-by-case critique of the PSRO recommendation. II App. 311-315. The HCFA Bureau of Quality Control then concluded that "there is merit" in Dr. Kwoun's arguments and returned the file to the PSRO with instructions to respond specifically to the points Dr. Kwoun had made. III App. 383-384. In response, the PSRO reviewed the records again, adhered to its previous recommendation, and sent the records back to HCFA in Baltimore with the comments of the peer

reviewers attached. III App. 385. HCFA forwarded this material to Dr. Kwoun's counsel, who filed a lengthy and vigorous response, including a case-by-case discussion of the patient records at issue. II App. 322-330; III App. 386-387.

HCFA then issued its decision, excluding Dr. Kwoun from Medicare eligibility for a period of 10 years. The decision made the following finding (II App. 336):

> Specifically, the evidence substantiates instances of unnecessary or inappropriate use of pacemakers, improper use of laboratory services, inappropriate drug usage, unnecessary hospital admissions, scheduling unnecessary surgery, excessive use of ancillary services based upon diagnosis and treatment rendered, and services rendered which were not consistent with the diagnosis. * * * * * [T]he evidence submitted by Dr. Kwoun in support of his claims of racial discrimination and personal antagonism was uncorroborated hearsay only. In light of this and of the compelling record evidence of his poor medical performance, we find his claims unsubstantiated and without merit.

Dr. Kwoun then exercised his right to a formal hearing before an administrative law judge. After the hearing, the judge reversed Dr. Kwoun's exclusion and ordered his reinstatement. In a 183-page opinion, the judge held that HCFA had committed procedural and substantive errors. III App. 348 *et seq.* The ALJ found two procedural errors. First, he found that Frank Kram, an employee in the HCFA Regional Office (and a defendant in this suit) had talked about the case twice with members of the PSRO. This, the ALJ held, violated HCFA procedures, which he interpreted to require that HCFA's action on the PSRO recommendation be based solely on the PSRO's written report. III App. 397, 402, 406-407. Second, the ALJ found that Dr. Kwoun and his counsel had not received adequate notice of the charges against him, since the

various oral and written notices they received were not sufficiently specific. III App. 399-400, 403-406, 407-408, 410-411.[4]

The ALJ went on to criticize the presentation of the case against Dr. Kwoun, saying that the testimony of one witness was a "complete fabrication" (III App. 511), that the PSRO and HCFA had engaged in "aberrational review" (*ibid.*), that the government witnesses should have acknowledged "the outdated equipment [Dr. Kwoun] had at his disposal" as well as "his rural community, the lack of cardiologists and other thoracic surgeons * * * at the same time criticizing perceived lack of consultation or referrals. This is strong evidence of stratagem" (III App. 511-512).[5]

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[4] On the substance of the case, the ALJ concluded (III App. 506):

> The Government has not proven by credible evidence that [Dr. Kwoun] provided services substantially in excess of the needs of the individual in any of the cases * * *. Furthermore, even though there may be a few isolated cases where there was some evidence that services were of doubtful necessity, the Government has not established that there was a pattern of services being consistently rendered which were substantially in excess of the needs of individuals. The evidence also fails to prove that the services rendered were of a quality which failed to meet professionally recognized standards of health care.

[5] The judge also criticized the HCFA employees involved in the case (III App. 513):

> The reviewers disregarded the facts in the patients' records, the practical, and physical situation under which the respondent practiced. They disregarded positive proof favorable to the respondent and made inferences unfavorable to the respondent in all cases where favorable inferences could or should have been drawn. The respondent at every opportunity called these failures to the attention of the Health Care Financing Administration. The prosecution witnesses didn't back off but changed their criticisms still disregarding the facts of the patient's case. This stubbornness on behalf of professional people is despicable and certainly not worthy of being condoned by the Health Care Financing Administration.

3. This suit followed. Four HCFA officials were named: respondents Frank Kram, Katherine Rosenfeld, Don Nicholson, and Ralph Howard. Kram and Rosenfeld were employees in the Kansas City Regional Office. Kram initially received the PSRO report and discussed it with members of the PSRO; Rosenfeld, his supervisor, signed the letter to HCFA in Baltimore concurring in the PSRO recommendation. III App. 375-376. Nicholson is a HCFA employee in Baltimore; he signed the notice of proposed exclusion sent to Dr. Kwoun. III App. 377-378. Howard is a HCFA official in Baltimore; he signed the final decision excluding Dr. Kwoun from Medicare eligibility. III App. 387-388.

Three counts of the complaint named the HCFA employees. Count IV alleged that these defendants denied Dr. Kwoun fair access to the HCFA procedures, as well as his right to practice medicine and to participate in the Medicare program with his reputation intact. This conduct, the complaint alleged, violated the Fifth Amendment. VII App. 894. Count V charged that the federal respondents "commenced a prosecution against plaintiff Kwoun and caused that prosecution to be continued without probable cause" (*ibid.*). Count VI charged that "defendants' conduct in commencing a prosecution against plaintiff Kwoun and causing that prosecution to be continued under the present circumstances and without probable cause for same, constitutes extreme and outrageous conduct" (*ibid.*). The factual allegations of the complaint charged that the HCFA officials were aware that the peer review committee gave Dr. Kwoun inadequate notice and issued an inaccurate report. The complaint also charged that the HCFA officials processed the peer review recommendation without following agency policies, published a newspaper notice of the proceeding, and in presenting HCFA's case before the administrative

law judge misstated the facts, overlooked evidence favorable to Dr. Kwoun, and fabricated evidence. VII App. 891.

4. The district court declined to dismiss the case against the federal respondents on the basis of absolute immunity, on the ground that "reasonable minds could differ as to whether [the officials'] activity is within [their] scope of authority" (Pet. App. 100a). All federal respondents (but one) immediately appealed that decision.[6] While that appeal was pending, the district court dismissed the complaint as to all defendants, on the ground that they were entitled to qualified immunity (Pet. App. 124a-139a). Petitioners' appeal from that decision was consolidated with the prior appeal.

5. The court of appeals, by a divided vote, affirmed the district court's order dismissing the complaint, on the ground that respondents were entitled to absolute immunity (Pet. App. 1a-42a). The court of appeals held that the HCFA employees had absolute immunity from petitioners' common-law tort claims under *Barr* v. *Matteo*, 360 U.S. 564 (1959), because their actions, even if mistaken, were within the scope of their authority (Pet. App. 8a-14a). The court also held that these employees were entitled to absolute immunity against the claims for constitutional violations, on the ground that their conduct occurred "in the context of essentially advocatory prosecutorial duties—'deciding whether a proceeding should be brought and what sanctions should be sought,' *Butz* [v. *Economou*, 438 U.S. 478, 515 (1978)], against 'a specific target,' *Gray* v. *Bell*, 712 F.2d 490, 501 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)" (Pet. App. 19a). The court of appeals also extended absolute immunity to the peer review physicians. The court concluded that peer review groups are analogous to the professional organiza-

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[6] One HCFA defendant, Katherine Rosenfeld, did not appeal.

tions to whom absolute immunity from constitutional claims has been granted when disciplinary actions have resulted in a lawsuit by the person disciplined. Pet. App. 27a-28a.

The dissent argued that the record did not contain sufficient evidence to support the conclusion that the HCFA defendants were performing prosecutorial or adjudicatory functions and were therefore entitled to absolute immunity. The dissent believed that the case should have been remanded for additional findings on this issue. Pet. App. 43a-47a, 54a-55a. The dissent also concluded that the Medicare statute required that the physicians acting as the peer review group receive only qualified immunity. *Id.* at 47a-54a (citing 42 U.S.C. (Supp. I 1977) 1320c-16(b)(1)) (correct citation).

ARGUMENT

The decision below is correct as to the federal respondents,[7] and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. The decision below is correct as to the respondent HCFA officials.[8] Those officials performed the tradi-

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[7] This brief is filed on behalf of the HCFA officials only; we do not address the issues relating to the peer review physicians, other than to note certain changes in the peer review procedures that have occurred since the case arose. See pages 14-15, *infra.*

[8] That decision does not conflict with any decision of this Court or of any other court of appeals. None of the decisions cited by petitioner is similar to this case. See *Harper* v. *Jeffries,* 808 F.2d 281 (3d Cir. 1986) (probation officers); *Tripati* v. *INS,* 784 F.2d 345 (10th Cir. 1986) (United States Attorney, immigration officer, and probation officers all found to have absolute or qualified immunity); *Cameron* v. *IRS,* 773 F.2d 126 (7th Cir. 1985) (tax protestor suit challenging IRS agents' processing of protestor's files); *Windsor* v. *The Tennessean,* 719 F.2d 155 (6th Cir. 1983) (wrongful discharge suit brought by prosecutor against United States Attorney), cert. denied, 469 U.S. 826 (1984); *Bothke* v. *Fluor Engineers & Constructors, Inc.,* 713 F.2d 1405 (9th Cir. 1983) (wrongful levy action against IRS official).

tional prosecutorial function of deciding, under highly discretionary statutory criteria, whether to adopt a recommendation to impose sanctions on a physician, and if so, whether to defend that decision before an administrative law judge. In view of those functions, they were entitled to absolute immunity.

In *Butz* v. *Economou,* 438 U.S. 478 (1978), this Court ruled that administrative officials performing functions analogous to those of prosecutors are entitled to absolute immunity from damages based on charges of constitutional violations when the officials act within the scope of their authority. The Court explained that "[t]he decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." *Id.* at 515. In particular, the Court emphasized that "[a]n agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought." *Ibid.*

The "broad discretion" which this Court saw as characteristic of the prosecutor's role is also evident here. HCFA's decision to proceed aganist Dr. Kwoun was governed by broad statutory criteria: whether Dr. Kwoun had furnished medical services that were "substantially in excess of the needs of individuals" or of a "quality which fails to meet professionally recognized standards of health care," and whether Dr. Kwoun failed "in a substantial number of cases[,] substantially" to comply with his obligations or had "grossly and flagrantly" violated his obligations in one or more cases. 42 U.S.C. 1395y(d)(1)(C); 42 U.S.C. 1320c-5(b)(1). Decisions under this type of broad standard are peculiarly susceptible to second-guessing and, in the context of discipline directed against a professional person, are almost guaranteed to elicit a damages action in the absence of absolute immunity.

The conclusion that HCFA officials making these determinations have absolute immunity is consistent with the court of appeals' decisions following *Butz* that have distinguished between prosecutorial and investigative decisions, holding that the latter are subject to only a qualified immunity. *Norton* v. *Liddel,* 620 F.2d 1375, 1379 (10th Cir. 1980) (prosecutor absolutely immune for filing charges); *Henzel* v. *Gerstein,* 608 F.2d 654, 657 (5th Cir. 1979) (same); see *Ray* v. *Pickett,* 734 F.2d 370 (8th Cir. 1984); *Gray* v. *Bell,* 712 F.2d 490 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984); *Forsyth* v. *Kleindienst,* 599 F.2d 1203, 1213-1215 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981). Here, the respondent HCFA officials became involved in the case only after the peer review committee had focused on Dr. Kwoun.[9] At that point, the HCFA officials' only role was to determine whether the facts developed by the peer review committee warranted initiation of a proceeding against Dr. Kwoun. That was a quintessentially prosecutorial determination.[10]

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[9] On December 17, 1979, the chairman of the peer review committee advised Dr. Kwoun in writing that his current actions "are being added item by item to your file on sanctions which is developing and will in due time be reviewed by the PSRO Board and other appropriate agencies for action." I App. 118; III App. 370-371. The allegedly improper meetings between a HCFA official and the peer review physicians—which were the earliest acts by HCFA officials alleged to violate Dr. Kwoun's rights—occurred in January and March, 1980. III App. 377, 406. In *Gray* v. *Bell, supra,* the court listed "important clues" for determining whether pre-indictment conduct is entitled to absolute immunity, one of which is the extent to which an official has focused on a specific target. 712 F.2d at 501. The December 17 letter focused on Dr. Kwoun. At that point, further proceedings became prosecutive rather than investigative.

[10] There is no merit to the contention made in the dissent that the case should have been remanded for further factual development concerning the roles played by the HCFA defendants. Pet. App. 45a-46a, 54a-55a. The case was decided on the basis of an extensive record, including a voluminous opinion by the administrative law judge which

Petitioners' claim that the members of the peer review committee were motivated by racial animus, even if correct, would not affect the immunity of the HCFA officials. The three counts in petitioners' complaint alleging racial discrimination do not name the HCFA defendants. VII App. 893-894 (Counts I-III). In addition, the only evidence of racial animus is a remark made at a social occasion by one of the 18 members of the peer review committee who voted on the recommendation. II App. 305-306. There was no allegation, and no evidence, that this racial animus was shared by any of the federal officials who were involved in this case.[11] Petitioners have cited no case, and we know of none, that would support the contention that a prosecutor's immunity from damages liability is overcome by evidence that an individual who recommended in favor of prosecution may have been racially motivated.

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describes in great detail the actions performed by the defendant HCFA officials. III App. 376-388. This description shows that respondent Frank Kram made the initial recommendation for HCFA to proceed; respondent Katherine Rosenfeld wrote a letter recommending this course to her superiors; respondent Don Nicholson issued the notice of proposed exclusion, participated in the informal hearing that ensued and in the remand of the case to the peer review committee; and respondent Ralph Howard issued the final notice of exclusion which was appealed to the administrative law judge. *Ibid.* In addition, respondent Kram appeared at the hearing before the administrative law judge and was one of HCFA's witnesses. III App. 348. Petitioners never contested these facts, or contended that additional facts existed to show that the HCFA defendants performed additional functions beyond those described. The court of appeals' conclusion that these functions were prosecutorial in nature is therefore amply supported by the record.

[11] The record does not support the statement made by the dissent below that Dr. Kwoun may have been singled out because he was "apparently the only minority doctor in the hospital" (Pet. App. 47a n.1). The record lists six staff doctors who attended the initial meeting with the peer review committee; the names listed suggest that at least four

2. In any event, recent modifications in the Medicare program substantially lessen the prospective importance of the issues petitioners seek to raise. In this case, the peer reviewers followed an informal, consultative procedure. Dr. Kwoun was not represented by counsel at the peer review stage, and he had no opportunity to meet with the committee as a body, to present witnesses before the committee or to question its members. In 1982, however, Congress amended the Medicare statute to provide that the peer review committee's recommendation will automatically go into effect unless the recommendation is altered or reversed by the Secretary within 120 days. Pub. L. No. 97-248, § 143, 96 Stat. 388 (codified at 42 U.S.C. 1320c-5(b)(1)). Moreover, in May 1987, HCFA amended its Peer Review Organization (PRO) Manual to require a PRO, before recommending sanctions, to meet with a physician, and also to require that the meeting comply with various safeguards designed to provide additional procedural protections for physicians.[12] Thus, under the procedures now in effect, PROs will render a legally binding decision, rather than merely offer a recommendation, and they must follow a prescribed process affording considerable procedural protections.

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of these physicians could have been members of minority groups (Drs. Kwoun, Varma, Tuma, and Kim). I App. 143. Nine problem cases were discussed at this meeting; Dr. Kwoun was the physician in five of these cases. I App. 144. It might be noted that the 18 peer review physicians who attended the meeting at which sanctions against Dr. Kwoun were recommended (all of whom are defendants in this suit) included Dr. Jose Gonzales, Dr. Pin Pu, Dr. Vinai Raksakulthai, and Dr. A.T. Tuma. I App. 165; VII App. 887-888. Sixteen doctors at the meeting voted for the recommendation. I App. 169.

[12] The meeting must satisfy the following requirements (Health Care Financing Administration, Dep't of HHS, *Peer Review Organization Manual, Transmittal No. 15,* at 6-12 to 6-12.3 (May 1987) (amending Section 6025):

1. Notice prior to the meeting, "including a clear statement of the factual bases for [the PRO's initial] findings, the purpose

These revisions show that the decision below is largely of historical, and not current, significance. The current procedures clearly provide the type of safeguards that the Court has held justify absolute immunity for actions taken within the scope of an official's duties. See *Cleavinger* v. *Saxner,* No. 84-732 (Dec. 10, 1985), slip op. 9; *Butz* v. *Economou, supra.*[13] In this case, unlike *Cleavinger,* some

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of the proposed meeting, the potential sanctions which may be imposed * * *, and the procedures applicable to the meeting."

2. The right to present expert testimony in either oral or written form.
3. Representation by an attorney at the meeting, who may assist the physician in the presentation of witnesses, ask questions of the peer reviewers designed to clarify their conclusions, ask for clarification of the peer reviewers' questions to witnesses and the physician, and present opening and closing statements.
4. Preparation of a verbatim transcript of the meeting, for the use of the physician and his counsel in their submission to HCFA in connection with its review of the peer review recommendation.
5. Disqualification from the final PRO vote of the peer review physician primarily responsible for developing the record and the PRO's initial findings.

We have provided a copy of this transmittal to petitioners' counsel and have also lodged a copy of it with the Clerk.

[13] In determining not to grant absolute immunity to members of a prison disciplinary committee, *Cleavinger* cited (slip op. 13) the absence of four procedural protections at disciplinary hearings: the right to counsel, the right to question witnesses, the right to receive a transcript of the hearing, and the right to have independent committee members make the final decision. These elements may be less important in the context of a proceeding like the one involved in this case, which will typically hinge on medical subjects that are best resolved by a dialogue among physicians, rather than on issues of credibility that require cross-examination. See *Ritter* v. *Cohen,* 797 F.2d 119 (3d Cir. 1986). *Ritter* held that due process does not require the state to conduct an evidentiary hearing before terminating a physician's eligibility

of these elements were available at the pre-suspension informal hearing held by HCFA, and all of them were available at the post-suspension hearing before the administrative law judge. The new procedures, which will be available in the first instance, not only strengthen the case for absolute immunity for PRO officials, but also make clear that a decision in this case will not govern cases arising in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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for Medicaid where the doctor was able to meet informally with the peer reviewers. As the Third Circuit explained, "[i]ssues such as the medical necessity of particular treatments, or the adequacy of a physician's records, are not determined to any great extent on credibility grounds. * * * Ritter had an opportunity to meet with the peer review team, and, most important, to submit written reasons why he should not be terminated from the program. Presentation of his case would not be significantly abetted by an evidentiary hearing." *Id.* at 123. In any event, the current procedures offer additional safeguards.

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